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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 24

GULF STATES STEEL COMPANY and
NATIONAL SURETY COMPANY,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF OF AMICUS CURIAE IN BEHALF OF MARTIN HOTEL COMPANY.

JOHN E. HUGHES,
First National Bank Building,
Chicago,
Amicus Curiae.

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May It Please the Court:

Comes now the undersigned and respectfully moves that this Honorable Court grant leave to file the annexed brief as *amicus curiae*. This brief is filed in behalf of the Martin Hotel Company, et al., pending Number 254 herein. Counsel for both parties have consented to the filing of this brief.

FOREWORD.

In the case of the Martin Hotel Company, in which the opinion of the Board of Tax Appeals is reported in *18 B. T. A. 826*, the opinion of the District Court in *52 F. (2d) 161*, and the opinion of the Circuit Court of Appeals in *59 F. (2d) 549*, a petition for a writ of certiorari has been filed and is Number 254 herein, this term. It is thought that the Court will await the decision of the *Gulf States Steel Case* before disposing of the petition in the *Martin Hotel Company Case* and in behalf of that Company this brief is filed.

POINTS TO BE URGED.

It is respectfully submitted that the present action cannot be maintained by the United States for the following reasons:

(1) The Statutes expressly forbid an action such as this under the circumstances here present.

(2) A recovery cannot be had on a written contract unless the same was breached and there is in this case no breach of the contract.

(3) To permit the United States to recover in an action such as this would be unjust in nearly all cases and in some cases disastrous to taxpayers.

These points will be argued in the order in which they are above set forth.

ARGUMENT.

At the outset of the argument it is well to make clear that the bonds were not entered into in these cases to prevent the Statute of Limitations running against the United States. The Treasury Department ruled that if it made an assessment in time there was no limitation on its right to collect the tax so assessed. It was not until the decision of this Court in the *Bowers case* on February 21, 1927, that the Department knew its view was erroneous. This is a matter of public record and is clearly set forth in the opinion of this Court in *Graham v. Goodcell, 282 U. S. 408,* at page *417.* It is thus obvious that the Treasury Department did not take these bonds to prevent a limitation running which it believed did not run. It took them solely to guard itself against the taxpayer's inability to pay and for no other reason.

THE STATUTE EXPRESSLY FORBIDS AN ACTION SUCH AS THAT HERE BROUGHT UNDER THE CIRCUMSTANCES HERE PRESENT.

Section 274 (b) of the Revenue Act of 1926 (Title 26, U. S. C. A., Sec. 1048 (a); 44 Stat. 55) provides in the applicable part as follows:

> "No part of the amount determined as a deficiency by the Commissioner, but disallowed as such by the decision of the Board, which has become final, shall be assessed or collected by distraint or by proceeding in court, with or without assessment."

The present proceeding in Court was brought for the exact amount "determined as a deficiency by the Com-

missioner, but disallowed as such by the decision of the Board, which has become final." The proceeding is clearly forbidden by the above provision of the Act. The Government's remedy was to have appealed the decision of the Board of Tax Appeals to the United States Circuit Court ofAppeals on the ground that the Board erred in failing to hold that the bond constituted a waiver. It did not do so and it has therefore lost the right to question this decision *(Old Colony Trust Company v. Commissioner, 279 U. S. 716).*

The case of *The United States v. John Barth Company, 279 U. S. 370,* on which the Circuit Court of Appeals and the District Judge relied in the case at bar, is not in point. In that case no appeal had been taken to the United States Board of Tax Appeals and the above Statute had no application.

A RECOVERY CANNOT BE HAD ON A WRITTEN CONTRACT UNLESS THE SAME WAS BREACHED. THERE IS IN THIS CASE NO BREACH.

It is axiomatic that a recovery cannot be had on a written contract unless the contract has been breached to the plaintiff's damage. In many of these cases the contract was to pay the tax eventually found due. If the Board of Tax Appeals has found no tax due and its decision has become final, it follows that there is no breach of the contract. Furthermore, in many of these cases, if at the time the contracts were entered into the taxpayers had paid the taxes instead of signing contracts they could have recovered them with interest under the provisions of *607 of the Revenue Act of 1928.*

In such case it is manifest that the Government has sustained no damage by reason of the contract but, on the contrary, is better off because it does not have to refund the tax plus interest thereon.

Again the case of *The United States v. John Barth Company, 279 U. S. 370,* is not in point. In that case the plaintiff's petition pleaded a breach of the contract and it came to this Court on a demurrer which admitted all facts well pleaded, including the breach of the contract and the damage alleged to result therefrom. Furthermore the *Barth case* is not in point because the Court expressly held in that case that the Statute of Limitations had not run for the reason that the bond was a waiver. In the case at bar it is conclusively settled by the decision of the Board of Tax Appeals that the Statute has run.

TO PERMIT THE UNITED STATES TO RECOVER IN AN ACTION SUCH AS THIS WOULD BE UNJUST IN NEARLY ALL CASES, AND IN SOME CASES DISASTROUS TO TAXPAYERS.

In the case of the *Martin Hotel Company, Number 254* herein, the taxpayer contested the tax not only on the ground of the Statute of Limitations but also on other issues going to the merits. The Board of Tax Appeals, in order to save time, split the issues and tried and decided the issue of the Statute of Limitations first. If the Government had appealed the Board's decision in that case to the Circuit Court of Appeals and that Court had reversed the Board and held that the bond was a waiver of the Statute of Limitations, then the case would have come back to the Board of Tax Appeals for trial on the merits. On the other hand, if this ac-

tion is sustained, the taxpayer, by virtue of the Government's failure to appeal the decision of the Board of Tax Appeals, is forever denied an opportunity to raise any question on the merits and in many cases taxpayers will have to pay taxes which they do not owe because they did not have the alleged income.

In the case of *Excelsior Motor Manufacturing & Supply Company, 5 B. T. A. 582,* the taxpayer appealed to the Board of Tax Appeals from a deficiency of $66,556.49. The Board of Tax Appeals on points wholly different from the Statute of Limitations and going to the merits of the case (an admitted inventory mistake and the absence of fraud) reduced this deficiency to $23,171.44. The taxpayer took an appeal from this decision to the Circuit Court of Appeals for the Seventh Circuit, and in *43 F. (2d) 968* it was held that the collection of the deficiency found by the Board was outlawed. That decision has become final. The Government has now brought a suit in the United States District Court at Chicago on a bond, not for the sum to which the deficiency had been reduced by the Board of Tax Appeals on points other than the Statute of Limitations, but for the entire sum originally claimed with respect to which the bond was given. It claims the suit is on a written contract and that the obligations of written contracts are not affected by any decisions which the Board of Tax Appeals may make in tax matters. It is such hair-splitting distinctions and such technicalities which frequently make laymen disgusted with law and which we must look to this Court to brush away.

To permit recovery in some of these suits would be disastrous to taxpayers because they cannot contest the

tax on the merits and because in this time of depression they have not the money to pay it.

Most of these jeopardy assessments were made hastily and consequently were made for the maximum amount by some clerk in the Bureau of Internal Revenue which might be claimed by the Government from the taxpayer. In the overwhelming majority of cases they were reduced on the merits upon further consideration in the Bureau.

All of which is respectfully submitted,

JOHN E. HUGHES,
First National Bank Building,
Chicago,
Amicus Curiae. In Behalf of Martin Hotel Company, et al., No. 254 herein.